Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

ARTHUR FARBER,

Petitioner,

v.

THE CITY OF UTICA and BARBARA B. BARRY,
Employee Benefits Coordinator of the City of Utica,

Respondent.

On Petition For Writ Of Certiorari
To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioner, and other persons similarly situated, was deprived of his property right, to wit, the statutory supplemental payment from the New York State Supplemental Fund, without due process of law, in violation of his due process rights under the United States Constitution, based upon the interpretation by the New York State Court of Appeals of the relevant statutes?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the New York State Court of Appeals, entered March 14, 2002.

OPINIONS BELOW

The opinion of the New York State Court of Appeals that gives rise to this petition has not been reported and is reprinted in the appendix hereto.

The opinion of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, filed May 2, 2001, is cited and is reprinted in the appendix hereto.

The opinion of the New York State Supreme Court, dated March 8, 2000 is unreported and is reprinted in the appendix attached hereto.

JURISDICTION

The judgment of the New York State Court of Appeals was entered March 14, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment 5

U.S. Constitution, Amendment 14

New York State Statutes:

Section 363(c) of the Retirement and Social Security Law

Section 378 of the Retirement and Social Security Law

Section 207-a General Municipal Law

STATEMENT OF THE CASE

A. Statement of Facts

The Petitioner was a firefighter, employed by the City of Utica, New York (City), when he became totally disabled in May 1973, as a result of injuries sustained while he was actively fighting a fire in the scope of his employment.

Petitioner, thereafter, has remained totally and permanently disabled.

Under current law in New York State, the Petitioner is entitled to receive payments from three (3) sources:

A) A disability pension under section 363(c) of the Retirement and Social Security Law (RSSL);

B) A supplemental payment under section 378 of the RSSL; and

C) A payment from the City under section 207-a of the General Municipal Law (GML).

Section 207-a GML requires a municipality to pay a disabled firefighter the base pay that an active firefighter, of the same rank as the disabled firefighter at the time of his injury, is currently receiving.

However, the municipality is entitled to reduce this payment by deducting the payment that the disabled firefighter receives from statutorily specified sources. It is this deduction that gives rise to the present controversy.

B. Statutes

Section 207-a GML requires the municipality to pay a disabled firefighter, disabled in the course of his duties, his full base salary while his disability continues. If the firefighter's disability is determined to be permanent, then the municipality may compel a disabled firefighter to accept a disability pension from the New York State Pension System (System), pursuant to section 363(c) RSSL.

If a firefighter is granted an accidental disability retirement allowance, then the municipality is only liable for the difference between the disabled firefighter's regular salary and the amount received from the System.

In 1980, the Petitioner was involuntarily retired and, thereafter, received a *disability pension* under section 363(c) RSSL. Petitioner also was entitled to receive a payment under section 207-a GML, consisting of the difference between the salary of an active firefighter, of the same rank as Petitioner at the time he was injured, entry level, and his *disability pension* pursuant to section 363(c) RSSL.

For several years thereafter, Petitioner receives his retirement *disability pension* under section 363(c) RSSL and a payment from the City under section 207-a GML.

In 1988, the New York State Legislature amended section 378 RSSL, to provide a supplemental payment to all qualified firefighters then receiving a pension under the System.

Petitioner was qualified and therefore received this supplemental benefit.

Petitioner continued to receive this supplemental benefit, in addition to his regular payments under sections 363(c) RSSL and 207-a GML, until 1999. In 1999, the City began deducting, not only the section 363(c) payment, but also the section 378 supplemental payment from the salary of an active firefighter to determine Petitioner's section 207-a payment. Thus, the City was totally depriving the Petitioner of his benefit from the payment under section 378 supplemental payment.

Petitioner contends that the City is only statutorily permitted to take credit for the section 363(c) payment and may not take credit for the section 378 supplemental payment. To take such credit deprives Petitioner of his right to property, to wit, his section 378 supplemental payment, without due process of law.

C. Proceedings Below

The Petitioner's position was initially sustained by the New York State Supreme Court, Acting Supreme Court Justice, John G. Ringrose.

The Appellate Division of the New York State Supreme Court, Fourth Department, unanimously affirmed the Supreme Court decision.

However, the Court of Appeals reversed the decisions of the Supreme Court and the Appellate Division, and by its decision authorized the City to receive the benefit of the section 378 supplemental payment and not the disabled retiree, the Petitioner.

Petitioner now requests a Writ of Certiorari so that the United States Supreme Court may determine the Fifth and Fourteenth Amendment issues involved.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS HAS DEPRIVED PETITIONER, AND OTHERS SIMILARLY SITUATED, OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

The New York State Court of Appeals wrote:

> "The City's statutory obligation guarantees a pensioner the 'full amount of . . . regular salary or wages' (GML 207-a[1]). If a firefighter is granted 'an accidental disability retirement allowance,' pursuant to Retirement and Social Security Law, section 363, 363(c) or similar accidental disability pension, however, the City is liable only for 'the difference between the amounts received under such allowance *or* pension and the amount of his [or her] regular salary or wages.' (GML 207-a[2]). (emphasis supplied)
>
> * * *
>
> "The phrase 'allowances *or* pensions' refers specifically and ~~exclusively~~ to 'an accidental disability allowance pursuant to section three hundred

> sixty-three * * * three hundred sixty-three-c * * * or similar accidental disability pension' (General Municipal Law Section GML 207-a[2]). The City's obligation must therefore be calculated in relation to *one* of these three statutorily specified *pension* sources." (emphasis supplied).
>
> (The Court of Appeals erroneously misquotes the statute using the plural, allowances or pensions, although the statute uses the singular, allowance or pension.)

The Petitioner categorically agrees with the Court of Appeals' assessment that the City's obligation must be calculated by using one of the three statutorily specified pension sources, either:

1) Section 363,

2) Section 363(c), or

3) Similar accidental disability pension.

Since the Petitioner receives a pension under section 363(c), and the section 378 supplement is not a separate accidental disability pension, the City may only take a credit for payments made to the Petitioner under section 363(c). The City may not take credit for payments made under any other section, including section 378, according to the New York State Statutes involved.

The Court of Appeals' reasoning, that the City's obligation must be calculated using one of the three statutorily specified pension sources leads to the only possible conclusion, that is, that the City's obligation must be calculated, in the Petitioner's case, using only section 363(c). The Legislature did not authorize the City to reduce is obligation by payments made under section 378.

However, the decision of the New York State Court of Appeals allows the City to deduct from Petitioner's 207-a payment, his section 378 supplemental payment. This results in Petitioner's being deprived of his right to this property, to wit, his section 378 supplemental payment, which is guaranteed by the New York State Legislature, without due process of law.

The City may only deduct the payment that the Legislature has authorized it to deduct. The City's deducting of any other payment deprives the Petitioner of these benefits without legislative authority and, therefore, without due process of law.

Thus, the decision of the New York State Court of Appeals permits the City to deduct section 378 supplemental payments from the Petitioner's section 207-a payments, although the legislation does not permit such deduction. This effectively deprives the Petitioner of his right to such payments without due process of law.

While section 207-a allows a deduction for section 363, 363(c) or similar accidental disability pensions, section 378 is not an accidental disability pension. section 378 provides supplemental payments to all qualified pensioners, including those pensioners who are not disabled, and therefore, section 378 supplemental payments cannot be deemed an accidental disability pension.

However, according to the decision of the New York State Court of Appeals, Petitioner's accidental disability pension includes payments under both section 363(c) and section 378. However, the Legislature does not consider both these payments the same, but considers each as a separate benefit.

For example, upon Petitioner's death, his surviving spouse will continue to receive the full section 363(c) payments. However, upon Petitioner's death, his spouse will only be entitled to receive 50% of his section 378 payment. Thus, the Legislature considers these as separate payments from separate statutory sources. (Upon Petitioner's death, all section 207-a benefits cease and his spouse is entitled to no further payments from the City.)

Further, the U.S. Court of Appeals, Second Circuit, has held that the pension payment and supplemental payments are distinct.

> " . . . the enabling State Legislature expressly provides that the supplementary payments are not considered pension or retirement payments, are legally distinct from pension funds. . . . " *Crown v. Trustees*, 819 F. 2d 47 (2d Cir. 1987).

II. THE ISSUES PRESENTED ARE OF GREAT STATEWIDE SIGNIFICANCE AFFECTING A LARGE NUMBER OF INDIVIDUALS.

The governing statutes apply to all disabled firefighters receiving a pension from all cities, towns and villages in New York State, except New York City, which have a paid Fire Department and who retried after 1978.

As acknowledged by Respondent in its brief to the Court of Appeals:

> "The questions presented in this case are of great statewide significance. . . . The . . . supplemental retirement allowance apply statewide and affect a large number of individuals and municipalities." (Page 3)

As the State Conference of Mayors and Municipal Officials wrote in its Amicus Curiae Brief to the New York State Court of Appeals:

> "A total of 82 Cities and Villages in New York State have paid Fire Departments." (Page 3)

Therefore, the issues presented to this Court are of significant magnitude and affect a large number of disabled firefighters within New York State.

This case presents the issue of the deprivation of a totally disabled person's right to receive a supplemental payment guaranteed by the state legislature without the statutory authority to do so.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant Certiorari to determine whether the City may deprive Petitioner of his statutory right to receive a legislatively granted supplemental payment, without statutory authority to do so and thus without due process of law which due process is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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This opinion is uncorrected and subject to revision before publication in the New York Reports.

NEW YORK STATE
COURT OF APPEALS

4 No. 26

In the Matter of Arthur T. Farber,

Respondent,

v.

City of Utica and Barbara B. Barry, &c.,

Appellants.

Charles N. Brown, for appellants.
Mark A. Wolber, for respondent.
New York State Conference of Mayors and Municipal Officials, *amicus curiae*.

CIPARICK, J.

On this appeal we are asked to determine a municipality's retirement payment obligation under General Municipal Law § 207-a. More precisely, the issue is whether the phrase "amounts received," in section 207-a(2) of the General Municipal Law, includes both base pension benefits and supplemental entitlements received pursuant to the Retirement and Social Security Law. We hold that it does.

Arthur T. Farber is a retired City of Utica firefighter. He was hired in March 1973 and in May 1973 was seriously injured in the line of duty while fighting a fire. The

injury left Farber permanently disabled and on October 18, 1980, the City involuntarily retired him. Consequently, Farber receives disability retirement benefits from three distinct statutory sources.

Pursuant to Retirement and Social Security Law § 363-c, he receives an annual disability pension from the New York State Retirement System. Pursuant to General Municipal Law § 207-a, he also receives from the City the difference between the State disability pension and the salary of active firefighters.

This appeal centers on the third statutory source of Farber's benefits. Pursuant to Retirement and Social Security Law § 378, Farber receives a supplemental allowance from the State.[1] Originally, the amount of this supplemental retirement allowance was $431 annually (*see* L 1998, ch 8). In 1995, the amount was increased to $1,117 (*see* L 1995, ch 119), and in 1998, it was again increased, to $1,726 (*see* L 1998, ch 390). After the third increase, the City became aware of the supplemental allowance and sought both to decrease its payments under General Municipal Law § 207-a and to recoup past overpayments. The City notified Farber that it was including the $1,726 State supplemental allowance as part of Farber's State disability pension, thereby reducing its own payments to Farber under section 207-a in the amount of the supplemental allowance.

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[1] Farber, and the courts below, erroneously indicated that the source of the supplemental allowance was Retirement and Social Security Law § 78 rather than section 378. Whereas section 78 applies generally to all other members of the New York State Retirement System, section 378 applies specifically to retired members of the police and fire departments.

Farber commenced an article 78 proceeding to compel the City to recalculate its obligation under General Municipal Law § 207-a. The City counterclaimed seeking reimbursement for alleged overpayments. Supreme Court granted Farber's petition and denied the City's counterclaim and the City appealed. The Appellate Division unanimously affirmed, holding that "there is no statutory authority for the City to reduce the amount of section 207-a benefits by the amount of the supplemental retirement allowance" (282 A.D.2d 39, 40 [4th Dept. 2001]). We now reverse.

In 1977, the Legislature amended General Municipal Law § 207-a, effecting dramatic changes in the statutory framework governing firefighters' disability and pension payments (L 1977, ch 965). As a result of the amendments, local and municipal pensions were discontinued and firefighters mandatorily enrolled in the State pension system (Retirement and Social Security Law §§ 113, 330). The amendment sought to "substantially reduce the financial burden of municipalities with respect to payments to disabled fire[fighters] and * * * allow funds presently used for such payments to be used to hire able fire[fighters] and thereby increase the level of fire protection in municipalities throughout the State" (Governor's Mem approving L 1977, ch 965, 1977 McKinney's Session Laws of NY, at 2543).

The 1977 amendment, however, only partially relieved municipalities of their burden. The City's statutory obligation guarantees a pensioner the "full amount of * * * regular salary or wages" (General Municipal Law § 207-a[1]). If a firefighter is granted "an accidental disability retirement allowance," pursuant to Retirement and Social Security Law §§ 363, 363-c or similar accidental

disability pension, however, the City is liable only for "the difference between the amounts received under such allowance or pension and the amount of his [or her] regular salary or wages" (General Municipal Law § 207-a[2]).

In *Matter of Mashnouk v. Miles* (55 NY2d 80, 88 [1982]), this Court held that the phrase "'regular salary or wages' * * * includes prospective salary increases given to active fire fighters subsequent to the award of an accidental disability retirement allowance or pension." Therefore, the amount of a pensioner's regular salary or wages is calculated based on the current salary of an active firefighter at the same grade the pensioner held upon retirement.

The City's payment obligation is determined by calculating the total "amounts received" by the pensioner relative to a retiree's "allowances or pensions" (General Municipal Law § 207-a; Retirement and Social Security Law § 363-c). The phrase "allowances or pensions" refers specifically and exclusively to "an accidental disability allowance pursuant to section three hundred sixty-three * * * three hundred sixty three-c * * * or similar accidental disability pension" (General Municipal Law § 207-a[2]). The City's obligation must therefore be calculated in relation to one of these three statutorily specified pension sources. Retirement and Social Security Law § 363-c entitles firefighters who are "physically or mentally incapacitated for performance of duty" to a disability pension (Retirement and Social Security Law § 363-c[b][1]).

In addition, members of the State pension system are also entitled to a "supplemental allowance" representing a

percentage of the base pension otherwise provided by the Retirement and Social Security Law (Retirement and Social Security Law § 378). Significantly, these supplemental allowances are not independent pensions. Instead, the supplements are wholly contingent upon payment of a base pension amount and computed accordingly.

We conclude from the statutory scheme that the supplemental allowance should reduce the City's obligation. Here, Farber's supplemental allowance derives from his Retirement and Social Security Law § 363-c disability pension. The phrase "amounts received" in General Municipal Law § 207-a includes, and expressly refers to, Retirement and Social Security Law § 363-c disability pensions. Insofar as § 378 benefits are funded from the same source – the State pension system – and exist only in relation to Farber's § 363-c benefits, they are subject to General Municipal Law § 207-a. Retirement and Social Security Law § 378 benefits are triggered upon payment of a statutory pension and are therefore a portion of Farber's total pension "amounts received" for purposes of General Municipal Law § 207-a.

Additionally, the Legislature clearly intended Retirement and Social Security Law § 378 to provide a cost of living adjustment to State retirement system pensioners (*see* Bill Jacket, L 1998, ch 390, at 4).[2] As we noted in *Mashnouk* (55 NY2d at 83, *supra*), municipalities are

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[2] Effective July 11, 2000, the Legislature enacted an automatic cost of living adjustment. Retirement and Social Security Law §378-a applies to "all disability pensioners regardless of age who have been retired for five years." This new provision is the subject of *Wise v. Jennings*, ___ AD2d ___ [3d Dept.], lv. denied ___ NY2d ___ [2002]).

responsible for payment of an active firefighter's salary, including all salary increases. This automatic pay adjustment obviates the need for a distinct and additional supplemental allowance to compensate for cost of living adjustments already included in the municipality's payment of "regular salary or wages." Moreover, the Legislature amended General Municipal Law § 207-a in order to lighten some of the municipality's burden regarding pension payments. As we stated in *Mashnouk* (55 NY2d at 87, *supra*), "[t]he relevant memoranda submitted to the Legislature in connection with the amendment indicate that the primary aim of the new statute was to shift a large portion of the financial burden generated by disabled firefighters from the municipal payrolls to the appropriate retirement system or pension fund." To permit offset here would be to "inequitably deprive [ ] the municipality of considering the value of other benefits received" (*Herzinski v. Village of Endicott,* 83 AD2d 305, 309 [1981]], *mod on other grounds* 57 NY2d 614 [1982]). Indeed, not permitting the City to deduct the supplemental allowance would mean that a disabled firefighter's benefits might exceed an active firefighter's salary – a result contrary to underlying legislative intent. Thus, we conclude that the City may take into account the § 378 supplemental allowance, as a portion of the retired disabled firefighter's total "amounts received," in calculating its obligation under General Municipal Law § 207-a.

Accordingly, the order of the Appellate Division should be reversed, with costs, the petition dismissed, the City's counterclaim reinstated and the matter remitted to Supreme Court for further proceedings on the counterclaim.

* * *

Order reversed, with costs, petition dismissed, respondent's counterclaim reinstated and matter remitted to Supreme Court, Oneida County, for further proceedings on the counterclaim. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Smith, Levine, Wesley, Rosenblatt and Graffeo concur.

Decided March 14, 2002

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

(Filed May 7, 2001)

(41B) CA 00-02250. (Oneida Co.) – MATTER OF ARTHUR T. FARBER, PETITIONER-RESPONDENT, V CITY OF UTICA AND BARBARA B. BARRY, EMPLOYEE BENEFITS COORDINATOR OF CITY OF UTICA, RESPONDENTS-APPELLANTS. — Judgment unanimously affirmed without costs. Opinion by Scudder, J.: Respondents appeal from a judgment granting the petition seeking to compel respondents to recalculate the amount of benefits paid to petitioner pursuant to General Municipal Law § 207-a (2) and dismissing the counterclaim. Petitioner, a former firefighter for respondent City of Utica (City), receives a disability pension (*see*, Retirement and Social Security Law § 363-c [b] [1]) to which has been added a "supplemental retirement allowance" pursuant to Retirement and Social Security Law § 78. Pursuant to General Municipal Law § 207-a (2), the City is obligated to pay petitioner section 207-a benefits, i.e., the difference between the disability retirement benefit paid pursuant to Retirement and Social Security Law § 363-c and the salary or wages of active firefighters, including prospective salary increases (*see*, *Matter of Mashnouk v Miles*, 55 NY2d 80, 88). The difference is calculated using the "zero option" retirement allowance, the maximum retirement allowance available to retirees, regardless of whether the retiree exercises that option (*see, Harzinski v Village of Endicott*, 57 NY2d 614, 617).

Here, respondents calculated the section 207-a benefits by adding petitioner's annual zero option disability retirement benefit of $11,062 and the annual supplemental retirement allowance of $1,726, and then determining

the difference between that total and the salaries or wages of active firefighters. Respondents contend that petitioner would receive more in the combination of retirement benefits and section 207-a benefits than active firefighters receive for salary or wages and that the City therefore is justified in reducing the amount of section 207-a benefits accordingly.

We conclude that Supreme Court properly granted the petition and dismissed the counterclaim because there is no statutory authority for the City to reduce the amount of section 207-a benefits by the amount of the supplemental retirement allowance. Retirement and Social Security Law § 78, providing for the supplemental retirement allowance, has been amended several times since the enactment of General Municipal Law § 207-a in its present version, and section 78 is silent with respect to those retirees also receiving section 207-a benefits. Thus, we conclude that the Legislature intended that those retirees receive the supplemental retirement allowance (*see*, McKinney's Cons Laws of NY, Book 1, Statutes § 74). In the absence of express statutory authority otherwise, respondents may not reduce the amount of the section 207-a benefit by the amount of the supplemental retirement allowance. Accordingly, we conclude that the judgment should be affirmed. (Appeal from Judgment of Supreme Court, Oneida County, Ringrose, J. – CPLR art 78.) PRESENT: PIGOTT, JR., P. J., PINE, HAYES, SCUDDER AND LAWTON, JJ. (Filed May 2, 2001.)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

In the Matter of the Application of ARTHUR T. FARBER, Petitioner, for a Judgment under Article 78 of the CPLR Seeking Computation and Payment of Disability Payment,

Petitioner,

-against-

THE CITY OF UTICA and BARBARA B. BARRY, Employee Benefits Coordinator of the City of Utica,

Respondents.

DECISION

RJI No. 32-00-84
Index No. 00-00170

(Filed Mar. 14, 2000)

APPEARANCES:

March A. Wolber, Esq., Attorney for Petitioner.

Charles N. Brown, Esq., Attorney for Respondent.

RINGROSE, J.:

Petitioner Arthur T. Farber has commenced this Article 78 proceeding seeking to compel the respondents to recompute their obligation to him under 207-a of the General Municipal Law. The petitioner receives a disability pension from the New York State Retirement System after his involuntary retirement as a disabled firefighter for the City of Utica.

Section 207-a of the General Municipal Law provides that a permanently disabled retired fireman shall receive from the municipality "the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages". The term "such allowance or pension" is referred to earlier in the section as "an accidental disability retirement allowance pursuant to section three hundred sixty-three of the retirement and social security law, a retirement for disability incurred in performance of duty allowance pursuant to section three hundred sixty-three-c of the retirement and social security law or similar accidental disability pension provided by the pension fund of which he is a member."

Petitioner also receives a supplemental retirement allowance pursuant to section 78 of the Retirement and Social Security Law. The respondents contend that their obligation to petitioner should be computed by the addition of this supplemental retirement allowance to his disability pension and that they are obligated to pay petitioner the difference between this total amount and his regular salary. Petitioner contends that the City's obligation should be computed without reference to his receipt of the supplemental retirement allowance.

In the absence of a specific legislative directive to take into consideration the supplemental retirement allowance in the computation under section 207-a of the General Municipal Law, it appears that the petitioner should receive the difference between his regular disability pension and his regular salary from the respondents without a credit to the City for the additional amounts payable as a supplemental retirement allowance. Such an approach would be in accordance with the general principle that "section 207-a of the General Municipal Law is a

remedial statute enacted for the benefit of fireman and should be liberally construed in their favor." (*Mashnouk vs Miles*, 55 NY2d 80, 88, quoting from *Pease vs Colucci*, 59 AD2d 233, 235). The fact that the Legislature enacted further legislation to benefit retired employees should not enure to the benefit of the employer rather than the retired employee.

Petitioner's request for relief is granted and the respondents are directed to recompute their obligation to petitioner in accordance with this decision. The counter-claim of respondents for reimbursement of amounts allegedly overpaid to petitioner in the past is accordingly dismissed.

Submit Order.

Dated: March 8, 2000
Utica, New York

/s/ John G. Ringrose
John G. Ringrose, Acting J.S.C.